88-694

No.

Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1988

A.E.C. TRADING CO., INC.,
Petitioner,
vs.
TRADEMASTERS INTERNATIONAL, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ISSUE PRESENTED FOR REVIEW

Whether an order denying a stay of litigation pending arbitration is appealable as a collateral order.

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OPINIONS BELOW

The opinion of the District Court is not reported.

The order of the Court of Appeals is not reported.

JURISDICTIONAL STATEMENT OF THIS COURT

The order of the Court of Appeals which dismissed the appeal from the interlocutory order denying the motion to dismiss due to applicability of the Convention on Recognition and Enforcement of Foreign Arbitral Awards was entered August 1, 1988.

No petition for rehearing was filed in the Court of Appeals.

This Court's subject matter jurisdiction to review the order of the Court of Appeals is premised upon 28 U.S.C. §1254(1).

STATEMENT OF FACTS

Trademasters filed its two count complaint on December 24, 1987 for an accounting for breach of a joint venture agreement. Trademasters appended to the complaint two contracts executed by and between Trademasters, A.E.C., and "Atlantica S.R.L. of Milan, Italy" on April 1, 1987, and April 17, 1987. The first paragraph of these contracts identifies Atlantica as "buyer" and A.E.C. as a "(seller) joint venture" with Trademasters.

The two contracts contain an identical clause in the following language:

> It is agreed that this agreement will incorporate force majeure as per incoterms rules, and arbitration under Zurich Swiss law.

Trademasters also appended to its complaint a letter which it alleged was a contract between itself and A.E.C. This letter, dated March 16, 1987, states:

> Our net price is .91 cents per pound. We split 50/50 on the difference of .96 cents or 2.5 cents each per pound.
>
> 1,500 metric tonx - 3,420,000 Pounds @ 2.5 cents = $85,500.00 each.
>
> I trust this meets with your complete satisfaction.

Trademasters alleges it sent this letter to A.E.C.

A.E.C. filed a motion to dismiss for lack of subject-matter jurisdiction on the grounds that the matter was governed by the Convention on Recognition and Enforcement of Foreign Arbitral Awards (see note foll. 9 U.S.C. §201). This motion was denied on June 1, 1988 (A-2). A.E.C. filed a notice of appeal from the order denying the motion on June 17, 1988. On June 29, the Court of Appeals requested A.E.C. to explain the jurisdictional basis for its appeal. On July 11, A.E.C. filed a memorandum in explanation. On August 1, the Court of Appeals issued a one page order dismissing the appeal for lack of jurisdiction (A-1).

JURISDICTIONAL STATEMENT OF THE DISTRICT COURT

Trademasters premised subject-matter jurisdiction upon 28 U.S.C. §1332. A.E.C. admits the facts creating diversity jurisdiction but contends that subject matter jurisdiction is absent as this cause of action is governed by the Convention on Recognition and Enforcement of Foreign Arbitral Awards.

ARGUMENT

AN ORDER DENYING A STAY OF LITIGATION PENDING ARBITRATION SHOULD BE DEEMED A COLLATERAL ORDER APPEALABLE UNDER THE "COHEN RULE"

Following this Court's decision in *Gulfstream Aerospace Corp. vs. Mayacamas Corp.*, 108 S. Ct. 1133 (1988), and relying upon *Langley vs. Colonial Leasing Co.*, 707 F. 2d 1, 4 (1st Cir. 1984), the Court of Appeals filed its opinion in *Crist vs. Miller*, 846 F. 2d 1143 (7th Cir. 1988), that an order denying a stay of litigation pending arbitration[1] is not a collateral order appealable under *Cohen vs. Beneficial Industrial Loan Co.*, 337 U.S. 541, 546 (1949). A.E.C. submits that the holdings in *Langley* and *Crist* have misconstrued the purpose of the collateral order doctrine articulated in *Cohen* and its progeny. That purpose is, for all *practical* purposes, defeated if, as mentioned in *Crist*, one must go through the gauntlet of litigation to have a judgment reversed after the expenditure of much time and several tens – or hundreds – of

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1 The papers filed below by A.E.C. sought a dismissal due to the absence of subject-matter jurisdiction. Matters governed by the Convention on Recognition and Enforcement of Foreign Arbitral Awards are dismissed for want of subject-matter jurisdiction. *Siderius, Inc. vs. Compania de Acero del Pacifico, S.A.*, 453 F. Supp. 22, 25 (S.D.N.Y. 1978); *Ledee vs. Ceramiche Ragno*, 528 F. Supp. 243, 245-246 (D.P.R. 1981); *McDonnell Douglas Corp. vs. Kingdom of Denmark*, 607 F. Supp. 1016, 1020 (E.D. Mo. 1985). However, A.E.C.'s papers also discussed the propriety of a stay of litigation pending arbitration, i.e., Mem. of March 23, 1988 at 3-5, although a stay was not specifically requested. The fact that A.E.C. did not specifically request a stay is immaterial. It is clear from the District Court's opinion that A.E.C.'s motion would have been denied had a stay been requested as an alternative mode of relief or as the only relief. Moreover, the Federal courts favor disposition of matters on their merits and elevate substance over form. Fed. Rul. Civ. Pro. 54(c) permits a judgment to award any relief justified by the evidence regardless of whether that relief had been specifically requested in the pleadings. A.E.C. submits that the last sentence of Fed. Rul. Civ. Pro. 1 makes the salutary purposes of Rule 54(c) fully applicable to this situation. Cf. *Hickman vs. Taylor*, 329 U.S. 495, 505 (1947).

thousands of dollars and only then be referred to arbitration. For this reason, A.E.C. submits that *any* order denying a stay of litigation pending arbitration should be deemed appealable under the *Cohen* rule. The reasoning in *Langley* and *Crist* is inconsistent with the intent and purpose of *Cohen*: appeal of an interlocutory order will be permitted if the order is such that the right to appeal will be lost if the appellant must await entry of a final judgment. *Cohen, supra*, 337 U.S. at 546.

A.E.C. submits that a blanket rule permitting a *Cohen* appeal of an order denying a stay pending arbitration is consistent with the rationale for allowing a *Cohen* appeal of an order rejecting a defense of double jeopardy, *Abney vs. United States*, 431 U.S. 651 (1977), or an order rejecting a defense of immunity, *Mitchell vs. Forsyth*, 472 U.S. 511 (1985). In both cases, this Court noted that these defenses would, for all practical purposes, be lost if they were subject to appellate review only after the trial they were intended to avoid. *Abney*, 431 U.S. at 657-662; *Mitchell*, 472 U.S. at 524-525.

The same must be said for this case. The purpose of arbitration – analogous to the protections of jeopardy and immunity – is to avoid a trial. The right to arbitrate – like the protections of jeopardy and immunity – has no meaning if one must go through the rigors of litigation before a denial of that right can be rectified on appeal.

Rejection of the *Cohen* rule in this type of case will force signatories to an arbitration contract to file declaratory judgment actions for construction of rights under the contract if they suspect their contractual partner will file a lawsuit instead of an arbitration. Rejection of the *Cohen* rule may discourage parties from entering into arbitration contracts. Those desiring arbitration to avoid litigation will realize that, if they lose the race to the courthouse, the right to arbitrate will have no meaning.

The judiciary strongly favors arbitration as an alternative means of resolving disputes. *Shearson-American Express Co. vs. McMahon*, 107 S. Ct. 2332, 2337 (1987). The order of the Court of Appeals, premised upon *Langley vs. Colonial Leasing Co.*, 707 F. 2d 1 (1st Cir. 1984), and *Crist vs. Miller*, 846 F. 2d 1143 (7th Cir. 1988), will inhibit the arbitration process as it essentially puts that process out of the reach of the litigant who is entitled to it and loses the race to the courthouse.

A.E.C. requests this Court to grant this petition for certiorari to determine whether an order denying a stay of litigation pending arbitration is collaterally appealable.

CONCLUSION

For the foregoing reasons, A.E.C. requests this Court to grant its petition for certiorari.

Respectfully submitted,

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 1, 1988

Before
Hon. RICHARD A. POSNER, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

TRADEMASTERS INTERNATIONAL, INC.,
an Illinois corporation,

Plaintiff-Appellee,

No. 88-2139 vs.

A.E.C. TRADING CO., LTD.,
A New York corporation,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

No. 87 C 10838
Brian Barnett Duff, Judge

ORDER

On consideration of the "AEC'S MEMORANDUM RE JURISDICTIONAL ISSUES" filed by appellant on July 11, 1988,

IT IS ORDERED that this appeal is DISMISSED for lack of jurisdiction. The inconvenience to a party of having to fully litigate a claim before being able to appeal from an interlocutory order does not constitute irreparable harm. *Crist v. Miller*, No. 88-1220, slip op. at 2 (7th Cir. June 1, 1988). The order appealed from, then, is not appealable under the collateral order doctrine.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TRADEMASTERS INTERNATIONAL, INC.
an Illinois corporation,

Plaintiff,

v.

A.E.C. TRADING CO., LTD.,
a New York corporation,

Defendant.

No. 87 C 10838

MEMORANDUM OPINION

This action for breach of contract and breach of fiduciary duty between Trademasters International, Inc. ("Trademasters") and A.E.C. Trading Co., Ltd. ("A.E.C.") is before the court on A.E.C.'s motion to dismiss for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). For the reasons stated below, that motion is denied.

FACTS

On or about March 16, 1987, Trademasters and A.E.C. orally agreed to act as brokers for a titanium dioxide sale, since Trademasters knew of a supplier and A.E.C. knew of a user. Employees of the two companies exchanged a memo signifying their agreement to divide the profits equally. *See* Complaint, Exhibit A.

Within the next four weeks, Trademasters and A.E.C. entered into two contracts with the titanium dioxide user, Atlantica S.R.L. of Milan, Italy ("Atlantica"). In those contracts, Atlantica was identified as the buyer and A.E.C. was identified as the seller in its joint venture with Trademasters.

The contracts also provide for arbitration under Zurich Swiss law. Complaint, Exhibits B and C.

Shipments of titanium dioxide were eventually sent to Atlantica, and A.E.C. kept records of the transactions pursuant to an agreement between it and Trademasters. Although Trademasters and A.E.C. never agreed that the latter would be compensated for these bookkeeping services, Trademasters' check for its share of the net profits contained a deduction for them.

DISCUSSION

The United States is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), 3 U.S.T. 2517, T.I.A.S. No. 6997 (reprinted foll. 9 U.S.C. § 201 (1988 Supp.)). The Convention and its enabling legislation, 9 U.S.C. § 201 *et seq.*, were designed to encourage the arbitration of international commercial disputes and to unify the standards by which such agreements are enforced. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520-21 n. 15 (1974).

Section 202 of the legislation provides that:

> [a]n arbitration agreement ... arising out of a legal relationship, ... which is considered as commercial, ... falls under the Convention. An agreement ... arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

9 U.S.C. § 202 (1988 supp.). Once an arbitration agreement is found to be covered by the Convention, courts undertake a limited inquiry in deciding whether to order arbitration. *Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Co.*,

767 F.2d 1140, 1144-45 (5th Cir. 1985); *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-87 (1st Cir. 1982). Specifically, they ask whether (1) there is a written arbitration agreement; (2) the agreement provides for arbitration in a signatory country; (3) the agreement arises out of a commercial legal relationship; and (4) the commercial transaction has a reasonable relationship with a foreign state. *Id.* If all of these factors are met, arbitration is mandatory and the case must be dismissed. *Ledee, supra.*

A.E.C. argues that dismissal is necessary because its contracts with Trademasters and Atlantica are covered by the Convention and all the requirements for enforcement of the arbitration clause are met. Trademasters, on the other hand, says that there are three contracts involved in this case, and A.E.C. is looking at the wrong ones. It claims that the dispute at issue in this lawsuit is solely between itself and A.E.C., thus the relevant contract is the oral one without an arbitration clause. In reply, A.E.C. contends that (1) the March 16, 1987 letter was not shown to be a contract; and (2) if it is a contract, it has been superceded by the subsequent written agreements.

A.E.C. seems to be missing the point. Trademasters never argued that the March 16 letter was a contract; instead, it claimed that the contract was oral and that the letter was evidence of it. Complaint, ¶¶5 and 6. In any case, a plaintiff alleging breach of contract need only plead the existence of the contract, a breach by defendant, plaintiff's performance, and damages. 12A Illinois Law and Practice, *Contracts* § 481 (1983). Trademasters' complaint adequately meets this standard. *See* Complaint, ¶¶ 5, 6, 10, 12, 13, 16, and 18.

A.E.C.'s second argument also is without merit. In order for a second contract to supercede or merge with a prior one, they must "relate[] to the same subject matter and embrace[] the same terms" *Kraft v. No. 2 Galesburg Crown Finance Corporation*, 95 Ill. App. 3d 1044, 1049-50 (3d Dist. 1981). Here

the two alleged contracts were entered into for different purposes and are sequential rather than overlapping. First Trademasters and A.E.C. determined how to divide the duties and the profits of their joint venture, then they reached an agreement with a buyer regarding the quantity and character of the goods, the packaging, and the methods of delivery and payment. Complaint, Exhibits B and C. In analogous cases, courts have held that the contracts were distinct. *See e.g., Alton Banking & Trust Company v. Schweitzer*, 121 Ill. App. 3d 629, 633-34 (5th Dist. 1984) (first guaranty did not merge into later note and guaranty where language and number of guarantors different and first guaranty provided for continuing obligation).

This court therefore agrees with Trademasters that it has alleged the existence of an oral contract with A.E.C., and that that agreement must be examined in order to determine whether the Convention requires dismissal of this lawsuit. We find that even if the contract comes within the scope of the Convention, that is, because it arises out of a commercial legal relationship and has a reasonable relation with a foreign state, arbitration cannot be ordered. The Convention clearly requires that an agreement to arbitrate must be in writing, and no such document exists here.

Admittedly, there is a strong public policy in favor of arbitration. That policy, however, cannot stretch so far that an arbitration clause in one agreement can be used to force the parties to arbitrate the breach of another contract. Accordingly, A.E.C.'s motion to dismiss is denied.

ENTER:

BRIAN BARNETT DUFF, JUDGE /S/
UNITED STATES DISTRICT COURT

DATE: June 1, 1988